IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 320

DANIEL O'DONNELL,

Petitioner,

vs.

GREAT LAKES DREDGE AND DOCK COMPANY,
A CORPORATION,

Respondent.

Brief for the Respondent.

EZRA L. D'ISA,
Attorney for Respondent.

B. S. QUIGLEY,
Of Counsel.

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STATEMENT OF THE CASE.

This is an admiralty case. Petitioner, a seaman, brought this action against the Respondent alleging injuries sustained, while on shore, in the course of his employment. The action is founded under the provisions of Section 33 of the Merchant Marine Act of June 5, 1920 (U. S. Code, Title 46, Section 688) amending Section 20 of the Seaman's Act of March 4, 1915, also known as the Jones Act. The trial court dismissed Count I of Petitioner's Complaint on the ground that the allegations on the face thereof showed a lack of admiralty jurisdiction. The Circuit Court of Appeals sustained this action on the part of the trial court. The only issue presented here is whether a

seaman, injured on land, may maintain an action under the Jones Act.

The petitioner in his brief on page 8, states that since no answer was filed by the respondent in the trial court, the facts alleged in the Complaint were admitted. Respondent's motion to strike was sustained as to Count I, and therefore no answer to said Count was necessary. The only admission made by the Motion to Strike was the admission generally following such a motion, and only for that purpose. Counts II and III of petitioner's Complaint were claims for wages, maintenance and cure, which arise out of contract, recoverable irrespective of negligence. Respondent was willing that the petitioner recover the wages, maintenance and cure to which he was entitled and therefore the only confest as to that was the nature and extent of injury.

Petitioner takes the position that the Jones Act applies to seamen injured both on the water and on land, completely wiping aside the well established jurisdictional requirements that a tort is governed by the law of the locus. He states that confusion arises where this rule of law is followed.

Errors Relied Upon.

Petitioner urges that error exists because the Circuit Court of Appeals held the Jones Act did not apply to seamen injured on shore, that there was further error in basing its decision on such constitutional limitation, and finally error in refusing to consider that the situation arises under the commerce clause of the Constitution.

These contentions are not tenable. The Jones Act does not apply to seamen injured on land, the jurisdiction in admiralty torts is confined to those occurring on navigable waters, and the Court did consider the commerce argument—adversely to Petitioner.

Jurisdiction.

The jurisdiction of this Court is claimed on the basis that the Circuit Court of Appeals "decided an important question of federal law which has not been, but should be, settled by this Court."

It has been held in numerous decisions of this court that a seaman injured on shore may not maintain an action under the Jones Act. See: *State Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375; *Crowell* v. *Benson*, 285 U. S. 22; *Minnie* v. *Port Huron Terminal Co.*, 295 U. S. 647; *Beadle* v. *Spencer*, 298 U. S. 124; two cases involving the same question—*Rudo* v. *A. H. Bull S. S. Co.*, 177 A. 538, certiorari denied 295 U. S. 759; and *O'Brien* v. *Calmar S. S. Corporation*, 104 Fed. (2d) 148, certiorari denied 308 U. S. 555.

The Opinion Below.

The opinion of the Circuit Court of Appeals in this matter is reported in 127 Federal Reporter, 2d. 901. The full text may be found in the record (R. 16-19).

ARGUMENT.

I.

Prior to the Jones Act, a seaman injured through the negligence of his employer had a remedy in admiralty without the right of trial by jury. The Jones Act gave the seaman the right to elect to proceed with a trial by jury.

Petitioner contends that the election provided a seaman in the Jones Act is between the right in tort arising for indemnification as theretofore existing and some State provision or system (Pet. Brief 13). That contention is contrary to the decisions of this Court.

A brief of a seaman's rights upon being injured ought to be considered at this point so as to properly present the whole picture to the Court.

This analysis is nicely put by the court in the case of *Smith* v. *Lykes Brothers—Ripley S. S. Co. Inc.*, 105 Fed. (2d) 604, (C. C. A. 5th Circuit—1939; certiorari denied 308 U. S. 604). At page 606:

> "(a) The right to recover wages, and the expense of maintenance and cure which was an incident to his contract for wages, payable irrespective of negligence unless the injury was brought about by the seaman's wilful misconduct.
>
> "(b) The right, under maritime law, to recover indemnity for injury caused by the unseaworthiness of the vessel, which was predicated upon negligence of the owner.

"(c) The right, under the Merchant Marine Act, *supra*, to recover indemnity for a personal injury suffered in the course of his employment.

* * *

"The three causes of action, (a), (b), and (c), above mentioned arose at the same time but depended upon different facts and distinct principles of law. The Appellant was required to elect between (b) and (c), the tort actions; but no election was required as to (a), wherein the duty of the Appellee arose as an incident to the contract for wages."

The basis for this analysis may be found in *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130. This Court holds that the election required from a seaman under the Jones Act is between recovery for negligence and for unseaworthiness of the vessel. See also *The Arizona* v. *Anelich*, 298 U. S. 110.

In the case of *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, wherein the opinion was rendered by Mr. Justice Van Devanter, it was held that the Jones Act "extends to injured seamen the right to invoke, at their election, either the relief accorded by the old rules or that provided by the maritime law as modified, and not between that law and some non-maritime system."

Petitioner fails to consider the distinction between contract and tort. It is elementary law that the place where the breach of contract occurs is immaterial in so far as substantive rights are concerned. It is likewise elementary law that the place where the tort occurs is very material in determining the substantive rights applicable. Petitioner

suggests that the right of a seaman to recover wages, maintenance and cure has been recognized since the Laws of Wisby, even though the injury occurred on shore. This is correct, because the remedy sought arises from the breach of contract. Nowhere, however, has petitioner pointed out any case wherein relief was afforded under the maritime law because of a tort arising on land.

The *W. H. Hoodless*, 38 Fed. Supp. 432, (Pa. 1941) clearly defines wages, maintenance and cure to arise from the contract of employment independent of any consideration of negligence or culpability, while the right to indemnification or the election to proceed under the Jones Act lies in tort.

II.

The Jones Act does not extend admiralty jurisdiction to cover non-maritime torts. An injury on shore is not within admiralty jurisdiction. Such injury is governed by the law of the locus.

It has long been held in an unbroken chain of authority by our Federal Courts that in order for an injury sustained to invoke admiralty jurisdiction such injury must have occurred on the vessel while on navigable waters. An injury sustained off the vessel is not a maritime injury and therefore does not come under the admiralty law; and, if there is no jurisdiction under the admiralty law, the petitioner's remedy lies under the law of the state having jurisdiction of the *locus*. It is respondent's contention therefore that the law of Illinois prevails and the petitioner's remedy lies under the Workmen's Compensation Act of that State.

The first U. S. Supreme Court decision under Section 33 of the Merchant Marine Act of 1920 was the case of *State Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263; October term, 1921. In that case the injured sustained injuries on shore in the course of his employment as a longshoreman while unloading a vessel lying in navigable waters in the State of New York. Action was commenced before the Industrial Commission of that State where an award was allowed, on the theory that the injury occurred under circumstances invoking the jurisdiction of the State of New York and not Admiralty. The Appellate Division of that State reversed the award and the Court of Appeals affirmed that action. On Writ of Certiorari to review, the Supreme Court of the United States reversed and remanded the case, Mr. Justice McReynolds delivering the opinion of the Court. On page 272 of the opinion, the learned judge said:

> "When an employee working on board a vessel in navigable waters sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of the employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied."

This case has become the leading case on the question and has been cited many times by our federal courts in reaching decisions in similar situations.

In the case of *Crowell* v. *Benson*, 285 U. S. 22, at page 55, Mr. Chief Justice Hughes said:

> "In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits

which are inherent in admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction."

That a different rule applies when injury occurs onshore was recognized in Mr. Justice Stone's opinion in the matter of *Beadle* v. *Spencer*, 298 U. S. 124, quotation follows, from page 129:

> "The rules, peculiar to admiralty, of liability for injuries to seamen or others, are applicable when the injury occurs upon a vessel in port as when at sea, although the common law may apply a different rule to an injury similarly inflicted on the wharf to which the vessel is moored."

The Supreme Court denied certiorari (295 U. S. 759) in the case of *Rudo* v. *A. H. Bull S. S. Co.*, 177 A. 538 to the Court of Appeals of the State of Maryland. The facts there were that a seaman was injured on dock unloading bags of coal. The Court held that in the absence from the Jones Act of an expressed or clearly implied design to extend its operation beyond the physical limits which the general maritime law has been applied, there is no sufficient ground for an adjudication assuming such an extension.

The first Federal District Court case is that of *Hughes* v. *Alaska S. S. Company* (District Court, W. D. Washington N. D., March 7, 1923) 287 Fed. 427. Plaintiff was a mess boy on the steamship "Skagaway" of which the defendant was the owner. The first mate ordered plaintiff upon the wharf to assist in unloading, where he was injured. Plaintiff's action was brought at law under Section 33 of the Merchant Marine Act of 1920, amending

Section 20 of the Seaman's Act of 1915. The Court, at page 428, had this to say:

"The question for determination is that of the court's jurisdiction to proceed further in this case under Section 33 of the Merchant Marine Act of 1920 (41 Stat. 4007), the advantage of which plaintiff asks, presumably to avoid meeting the defense that he was injured through the negligence of a fellow servant. The language of Section 33 of the Merchant Marine Act of 1920, amending Section 20 of the Act of March 4, 1915, upon which plaintiff relies, is as follows:

'That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury * * * 41 Stat. p. 1007.'

"The contention is that the use of the expression 'in the course of his employment,' coupled with the fact that a seaman may be required to handle the ship's lines or cargo upon the dock, shows that Congress intended that this court should have jurisdiction over torts resulting in the seaman's injury on shore in such service to the ship.

"In view of the well established principle that the jurisdiction in the admiralty is confined to torts committed or suffered upon the high seas or other navigable waters, such an intention would have to be clearly shown. No such intention on the part of Congress is disclosed by the language used in Section 33."

This decision clearly follows this Court's reiteration of a well-established Admiralty jurisdictional requirement concerning tort liability as stated in the *Nordenholt* case, *supra*.

This decision distinguishes clearly that Section 33 does not create a new cause of action but merely permits the former cause of action to be determined maintaining the same jurisdictional requirements. This case has been cited with approval by many District Courts and Circuit Courts of Appeal of our Federal judiciary.

The next leading case much cited is that of *Todahl* v. *Sudden & Christenson, et al.* (Circuit Court of Appeals, Ninth Circuit. April 20, 1925. Rehearing denied May 11, 1925) 5 Fed. (2d) 462 (pg. 463).

> "One of the questions presented is whether or not the plaintiff was entitled to bring an action under the Merchant Marine Act of 1920. We find no warrant in any provisions of that act for disregarding the prior well-settled rule that admiralty has no jurisdiction over torts committed on land."

After reviewing several cases, including that of *Hughes* v. *Alaska S.S. Company, supra,* the Court reached the conclusion that nowhere in the act is there an expression of the intention of Congress to enlarge the admiralty jurisdiction.

The next case in point is that of *"The Montezuma"* (District Court, W.D. New York. October 29, 1926) 15 Fed. (2d) 580.

> "The trend of all the decisions is that, where the injury was received upon land, then cognizance of the tort cannot be taken in admiralty; but, if it was received on the ship in navigable waters, jurisdiction *in rem* for damages is beyond question."

The Court quotes from several decisions of sister branches of the Federal courts all to the same effect. One concise quotation is found on page 581:

> "In actions which are *ex delicto*, the question whether the tort is maritime or non-maritime does not

depend upon whether or not the person who brings the action was, when he was injured, working under a maritime contract. It depends solely upon the locality of the person injured at the time the wrong was committed. If the wrong takes place on land it is not maritime, and if it takes place on navigable water it is maritime."

This case was reviewed by the Circuit Court of Appeals, Second Circuit, May 2, 1927, 19 Fed. (2d) 355, and was affirmed in so far as the jurisdictional question involved.

The next expression by the Federal judiciary in a similar situation appears in the case of *Kulczyk v. Rockport S. S. Co.* (District Court, E.D. Michigan, N.D., October 16, 1934) 8 Fed. Supp. 336.

Plaintiff's action was at law seeking damages for injuries received while he, a seaman, was engaged in shifting certain cables in an effort to fasten his ship to the dock. The Court, at page 337, said:

"It is, in my opinion, now clearly settled that when a seaman claims to have been injured by the tort of his employer, even though he was engaged in the performance of a maritime contract when so injured, the question whether liability for such tort is to be determined according to the rules of the maritime law or according to the rules of the local law depends upon the question whether the injury was received on navigable water or on land."

And further on:

"Applying this rule to the present case, as the alleged injuries complained of were sustained by the plaintiff while he was standing upon a dock on land and not upon a vessel, or elsewhere on any navigable water, it is manifest that the alleged tort in question was a non-maritime tort, and therefore not subject to

the jurisdiction of admiralty nor subject to the rules of the maritime law. It follows, from elementary principles of l[illegible], that the rights and liabilities of the parties herein are governed by the applicable law of Ohio, including the statute already mentioned." (Said statute being the Ohio Compensation Act.)

A very unusual case, but expressing the same viewpoint is the case of *Esteves* v. *Lykes Bros. S. S. Co., Inc.*, Circuit Court of Appeals, Fifth Circuit. December 18, 1934, 74 Fed. (2d) 364 (pg. 365).

"We agree with the District Court that Section 33 of the Merchant Marine Act does not apply. That section was enacted under the powers given the United States by the Constitution over maritime matters and ought not to apply beyond the well-understood limits of admiralty jurisdiction. It relates wholly to personal injuries, and it is fully settled that such injuries which are inflicted on shipboard are under admiralty jurisdiction, but those occurring on land, though to maritime employees and at the ship's side, are under the law of the land."

In the case of *Jeffers* v. *Foundation Co.*, Circuit Court of Appeals, Second Circuit, July 13, 1936, 85 Fed. (2d) 24. Appeal from the District Court of the U. S. for the Southern District of New York where a judgment dismissed plaintiff's complaint at close of plaintiff's case. In affirming that action, the Court said at page 24:

"The question upon which this case turns is whether the plaintiff may recover under the Jones Act (Section 688, title 46, U. S. Code, 46 U. S. C. A. S. 688), or whether he is confined to the Pennsylvania Workmen's Compensation Act."

The facts were that plaintiff was a diver, working on the foundation for a pier of a bridge being erected across the

Ohio river at Pittsburgh. While there a negligent fellow workman prematurely fired a charge of dynamite and caused plaintiff's injuries. The Court ruled that the Jones Act is confined to navigable waters and further said, at page 25:

> "Therefore even though plaintiff be a 'seaman,' a question which we need not answer, he cannot recover unless he was within those waters."

A recent expression on this situation is the case of *O'Brien* v. *Calmer S.S. Corporation*, the Circuit Court of Appeals, Third Circuit, May 16, 1939, 104 Fed. (2d) 148. Plaintiff, a seaman, slipped on a piece of iron which was lying in the gravel on the pier. He brought action under Section 33 of the Merchant Marine Act of 1920, otherwise known as the Jones Act. The trial court dismissed the action and on appeal the opinion was delivered by Judge Biddle who had this to say:

> "The Jones Act provides that a seaman may recover for personal injuries suffered 'in the course of his employment * * *' with the right of trial by jury.' The act has been construed not to extend beyond admiralty jurisdiction, and not to apply to injuries on land. *Hughes* v. *Alaska S.S. Co.*, D. C., 287 F. 427; *Esteves* v. *Lykes Bros. S.S. Co.*, 5 Cir., 74 F. 2d 364, certiorari denied 295 U. S. 751, 55 S. Ct. 830, 79 L. Ed. 1695; *Todahl* v. *Sudden & Christenson*, 9 Circ., 5 F. 2d 462. The trial court was without jurisdiction to entertain the suit. The Workmen's Compensation Law of Pennsylvania, 77 P. S. Pa. 1 *et seq.*, presumably applied. *Lawton* v. *Diamond Coal & Coke Co.*, 272 Pa. 74, 115A. 886; *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013."

The U. S. Supreme Court denied writ of certiorari at the October term of 1939, 308 U. S. 555.

The following cases hold likewise that an injury on land is not within the Jones Act. *Lindh* v. *Booth Fisheries Co.*, 2 Fed. Supp. 19, (Washington—1932), seaman fell from dock; *Seifort* v. *Keausburg Steamboat Co.*, 20 Fed. Supp. 542 (N.Y.—1937), seaman injured while assisting in the docking of the ship; *Nixon* v. *Raymond City Coal and Transp. Co.*, 280 Ky. 743, 134 S. W. (2d) 633, (1939), seaman injured on land; *Oliver* v. *Calmar S.S. Co.*, 33 Fed. Supp. 356, (Pa.—1940).

The Court will see that in every case above cited the accidental injury occurred in very close proximity to the vessel, but in each instance, off of it. It is not Respondent's contention that Petitioner in this case ought to be remediless, but that his remedy lies under the law of the State of Illinois. The State of Illinois has set up an Industrial Commission operating under the terms of the Illinois Workmen's Compensation Act, administering prescribed relief in situations such as in the instant case. There is no reason why plaintiff should not seek his remedy thereunder.

The wording in Count I of the complaint, "working *for a few minutes only* on the staging over the side of the vessel," indicates petitioner appreciated the jurisdictional problem with which he was confronted and *ab initio* attempted to evade the question by excusing himself with the statement "*for a few minutes only.*" It is not understandable why he should battle so furiously and go to such lengths as he does to obtain redress when a very simple method and procedure is open to him by way of the Illinois Industrial Commission, before which body respondent would be without defense as to jurisdiction, and otherwise protected.

III.

The Jones Act was remedial legislation. The Federal Employers' Liability Act applies to it only as to procedural matters.

The case of *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748, wherein the opinion was rendered by Mr. Justice Van Devanter, contains the most exhaustive Supreme Court analysis of the application of the Federal Employers Liability Act to the Jones Act. Quotation from this decision:

> "The source from which the new rules are drawn contributes nothing to their force in the field to which they are translated. In that field their strength and operation come altogether from their inclusion in the maritime law."

In the case of *Curtis Bay Towing Co.* v. *Dean*, 199 Atl. 521, after reviewing many cases in point and particularly the *Panama R. R. Co.* v. *Johnson, supra*, the Court had this to say at page 527:

> "The statute is not intended as an encroachment upon the maritime law as it existed prior to its enactment, but has been construed by the Supreme Court of the United States to be a permissible addition to that law of new rules concerning the rights and obligations of seamen and their employers. By the act, injuries to seamen are not withdrawn from the operation of the maritime law, nor are they themselves permitted to do so; but the statute applies to that law new rules drawn from another system, and therefore extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules."

In the case of *Brown* v. *C. D. Mallory & Co.*, 122 Fed. (2d) 98, the Court at page 101, said:

> "The election between alternatives accorded to the injured seaman referred to by Mr. Justice Van Devanter is a choice between the remedies afforded him by the old maritime law and the remedy granted him by the Jones Act within the framework of admiralty law."

The wording of the Jones Act is "and in such action all statutes of the United States modifying or extending the common-law *right* or *remedy* in cases of personal injury to railway employees shall apply"; and conclusively shows that Congress was establishing remedial novelties. Note the use of the words "right or remedy." Further, the benefits intended to be carried by the reference of another system of law were to take from the employer the defenses of assumption of the risk and fellow-servant doctrines, and permit contributory negligence to be urged only in mitigation of damages. All of these are remedial.

A case on almost all fours with the present matter is that of *Soper* v. *Hammond Lumber Company*, 4 Fed. (2d) 872. In that case the plaintiff urged that since the injury to the seaman occurred on land, he was entitled to proceed in admiralty under the provisions of the Federal Employers Liability Act just as Petitioner in this case attempts to do. The opinion rendered by the learned judge in that case is concise, well put and fully governs the point made by Petitioner in this case. The decision follows:

> "'This is an action for personal injuries, designated by plaintiff a 'complaint by a seaman under the Railroad Employers' Liability Law, 35 St. 65' (being Comp. St. §§ 8657-8665). The allegations are that plaintiff was employed as able seaman on the Covena,

a ship engaged in interstate commerce, and that while he was engaged in loading the vessel a pipe of lumber on shore fell upon and injured him.

"The action is headed as above described, according to plaintiff's brief, upon the theory that Section 33 of the Merchant Marine Act of 1920 (Comp. St. Ann. Supp. 1923, § 8337a), adopts the railroad liability statute, as to vessels engaged in interstate commerce, no matter where the seaman is injured, provided only it can fairly be said to be within his employment as a seaman. Judge Cushman, in *Hughes v. Alaska S.S. Co.*, (D. C.) 287 F. 427, held directly to the contrary. However, in the latest (5th) edition of Benedict on Admiralty, § 25, the editor critizes Judge Cushman's decision, and argues that Section 33 made the rights of seamen thereunder to depend upon his contract of employment.

"I cannot see it that way at all. Section 33 of the Merchant Marine Act provides that 'any seaman who shall suffer personal injury in the course of his employment' may have his election to proceed at common law. But, if he is injured on shore, even in the course of his employment, he needed no congressional permit to bring an action at common law. The clear intent and purpose of the section was to give him a right which he did not posses before—namely, an election to pursue a common-law remedy if he were injured on board ship. Prior to the enactment of section 33, he had no remedy, except at Admiralty, without a jury, and his recovery (except in the case of unseaworthiness) was restricted to wages, maintenance, and cure.

"It is, of course, elementary that remedial legislation, if at all ambiguous, is to be construed in the light of the mischief to be cured. The mischief here

was the fact that the seaman was deprived of the right of trial by jury for maritime injuries, and restricted in the amount of his recovery. But he never was so deprived or so restricted for injuries occurring on shore. I think, moreover, that *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748, which is cited as being contrary to the *Hughes* Case, is in strict accord with it. At Page 388 (44 S. Ct. 394) occurs the following language:

'Rightly understood the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the maritime law as modified, and not between that law and some nonmaritime system.'

"The question received exhaustive treatment in *Industrial Commission* v. *Nordenholt Co.*, 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013. That was error to the Supreme Court of New York, which had held that a stevedore injured on the dock was not entitled to compensation, because his contract was maritime. The Supreme Court of the United States, in reversing the Supreme Court of New York, makes this broad, general distinction:

'When an employee, working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general

maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land.'

"In *Chas. Nelson Co.* v. *Curtis*, 1 F. (2d) 774, the Court of Appeals for this circuit in holding that the owner of a vessel is entitled to limitation of liability as against a seaman's suit under section 33, quotes the above language from *Panama Railroad* v. *Johnson*.

"I am constrained to hold, therefore, that section 33 has no application to an injury received on shore."

In the case of *The Arizona* v. *Anelich*, 298 U. S. 110, at page 119, Mr. Justice Stone had this to say:

"The source from which these rules are drawn defines them but prescribes nothing as to their operation in the field to which they are transferred. 'In that field their strength and operation come altogether from their inclusion in the maritime law' by virtue of the Jones Act. The election for which it provides 'is between the alternatives accorded by the maritime law as modified and not between that law and some non-maritime system.' "

Remedial statutes do not change substantive rights. Jurisdiction of maritime torts is substantive. The Jones Act is remedial. *Arizona* v. *Anelich*, 298 U. S. 110; *Chisholm* v. *Cherokee-Seminole S.S. Corporation*, 36 Fed. Supp. 967, (N.Y.—1940).

An action under the Jones Act is a maritime action and subject to the rules of the law maritime. *Panama R.R. Co.* v. *Johnson*, 264 U. S. 375; *The Arizona* v. *Anelich*, 298 U. S.

110; *Rudo* v. *A. H. Bull S.S. Co.*, 177 A. 538; *Sevin* v. *Inland Waterways Corporation*, 88 Fed. 988; and *Charles Nelson Co.* v. *Curtis*, 1 Fed. (2d) 774.

Petitioner cites *The Arizona* v. *Anelich, supra*, as authority for his contention that the Jones Act was intended to extend the maritime jurisdiction. There appears a quotation at page 11 of his Brief. If the quotation had but continued a further sentence or two it would appear that Mr. Justice Stone went on to say that the Jones Act was "to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part."

IV.

The Jones Act is not an exercise by Congress of its right to regulate commerce. It is an exercise by Congress of the right to prescribe remedies within admiralty law.

The right to prescribe admiralty rules and the commerce power of Congress are two distinct matters. The fact that Congress has acted upon the former does not necessarily raise the presumption that the latter was likewise in contemplation: *Genesee Chief* v. *Fitzhugh*, 12 How. 452, 13 L. Ed. 1062. In speaking of the application of the commerce powers of Congress to the Admiralty jurisdiction of this Court, Mr. Chief Justice Taft in *London Guarantee and Accident Co.* v. *Industrial Accident Commission*, 279 U. S. 109, at page 124, had this to say:

> "They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grant."

This was quoted from Mr. Justice Clifford in *The Belfast*, 7 Wall. 624, 640, 19 L. Ed. 266, 270. Cited also were *Genesee Chief* v. *Fitzhugh, supra*; *Re Garnett*, 141 U. S. 1, 35 L. Ed. 631, 634; *Ex Parte Boyer*, 109 U. S. 629, 632,

27 L. Ed. 1056, 1057; *The Commerce*, (*Commercial Transp. Co.* v. *Fitzhugh*), 1 Black, 574, 578, 17 L. Ed. 107, 109.

Petitioner cites *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, as authority by this Court to extend admiralty jurisdiction over non-maritime torts through the commerce power of Congress. In that case the railroad operated a boat in connection with its business as a common carrier. The injury occurred on board, and the injured man proceeded under the Federal Employers' Liability Act, which provided a remedy to him for negligence of the employer's servants and agents or for negligence in the maintenance and operation of employer's "cars, engines, appliances, machinery, track, roadbed, works, *boats*, wharves, or other equipment." The question arose whether *boats* could properly be included within the scope of the Act. At page 213 the Court, through Mr. Justice McReynolds, said:

> "Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having a direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto. It is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters merely because the ocean-going ship concerned happened to be owned and operated by a company also a common carrier by railroad. The word 'boats' in the statute refers to vessels which may be properly regarded as in substance but part of a railroad's extension or equipment as understood and applied in common practice."

Very definitely the Court refused to extend the commerce provisions to "another kind of carriage recognized as separate and distinct from transportation on land," and

ruled the boat to be equipment of the railroad and for that reason within the commerce provision. Clearly the Courts points out that "it is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters."

Petitioner further cites *National Labor Relations Board v. Waterman Steamship Corporation*, 309 U. S. 206, as further authority by this Court to extend its jurisdiction in admiralty through Congress' powers to regulate commerce. That Congress has power through the commerce clause to regulate an employee's hire, or contract of employment or discharge is well-established. The N. L. R. A. has done this. That this has been held to include seamen has been so held in the *Waterman* case, *supra*. But, this is not an extension of maritime jurisdiction to torts occurring on shore. The regulation and control exercised in the N. L. R. A. is over contracts of hire, bargaining unions and employment in general; in other words, the contract of employment. This Court always has had Admiralty jurisdiction where a seaman's contract of employment has been concerned; *i. e.*, recovery for wages, maintenance and cure. But, not for tort on land. In matters *ex delicto* jurisdiction is established by the *lex locus*.

These two citations are the only ones which would, from Petitioner's brief, indicate any pertinency. It is respectfully submitted that neither of these cases confirms or even intimates an approval of Petitioner's contention that the commerce power of Congress has been used to or even suggests any intent to extend the Admiralty jurisdiction of this Court to non-maritime torts. On the contrary, these two cases bear out Respondent's contention that "it is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters," and that, while the Federal Judiciary has Admiralty jurisdiction of many matters maritime even though the breach

may occur on land, this jurisdiction never has been extended to torts occurring on shore, not even through the commerce powers of Congress.

CONCLUSION.

Petitioner goes to great length to wipe aside decisions specifically limiting the "land-lubber's" act in its application to a mariner's action. He attempts to extend jurisdiction. He states that an unnecessary and confusing situation is created. It is unnecessary and confusing only in so far as this case is concerned because he makes it so. The law is well-defined and if Petitioner would but seek his redress conventionally, much time, effort and money would be saved. Petitioner, with a wave of the pen, terms the myriad of decisions against his position as being mere *dicta* and asks this Court to abandon the view reached after deliberate consideration in so many cases because it works a hardship—on his theory.

Because petitioner's injury occurred on land and not on board ship, the tort was not within maritime jurisdiction and, therefore, the Court was without jurisdiction to entertain an action brought under the Jones Act.

It is respectfully submitted that the trial court did not err in dismissing Count I of plaintiff's Complaint, that the Circuit Court of Appeals was correct in affirming that action.

Because of the record in this case, and because of the law thereto applicable, it is respectfully submitted that the judgment of the Circuit Court of Appeals was correct and should be affirmed.

Respectfully submitted,

EZRA L. D'ISA,
Attorney for Respondent.

B. S. QUIGLEY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 320.—October Term, 1942.

Daniel O'Donnell, Petitioner, *vs.* Great Lakes Dredge and Dock Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 1, 1943.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The question for decision is whether a seaman injured on shore while in the service of his vessel is entitled to recover for his injuries in a suit brought against his employer under the Jones Act. § 33, Merchant Marine Act of 1920, 41 Stat. 1007, 46 U. S. C. § 688.

Petitioner was a deckhand on respondent's vessel "Michigan", engaged in transporting sand from Indiana to Illinois over the navigable waters of Lake Michigan. As her cargo was being discharged through a conduit passing from the hatch and connected at its outer end to a land pipe by means of a gasket, petitioner was ordered by the master to go ashore to assist in repair of the gasket connection. While he was so engaged the alleged negligence of a fellow employee caused a heavy counterweight, used to support the gasket, to fall on petitioner and cause the injuries of which he complains. The district court dismissed the cause of action under the Jones Act and granted an award for wages. The Court of Appeals for the Seventh Circuit modified the judgment, 127 F. 2d 901, by allowing an additional award for maintenance and cure, but held that no recovery could be had under the Jones Act for injury to a seaman not occurring on navigable waters. We granted certiorari, 317 U. S. —, the question being one of importance in the application of the Jones Act.

The Jones Act, so far as presently relevant, provides:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-

law right or remedy in cases of personal injury to railway employees shall apply . . ."

The Act thus made applicable to seamen injured in the course of their employment the provisions of the Federal Employers Liability Act, 45 U. S. C. §§ 51-60, which gives to railroad employees a right of recovery for injuries resulting from the negligence of their employer, its agents or employees. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375; *The Arizona* v. *Anelich*, 298 U. S. 110. The term "seamen" has been interpreted to embrace those employed on a vessel in rendering the services customarily performed by seamen, including stevedores while temporarily engaged in stowing cargo on the vessel. *International Stevedore Co.* v. *Haverty*, 272 U. S. 50; *Buzynski* v. *Luckenbach S. S. Co.*, 277 U. S. 226. There is nothing in the legislative history of the Jones Act to indicate that its words "in the course of his employment" do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters. On the contrary it seems plain that in taking over the principles of recovery already established for railroad employees and extending them in the new admiralty setting (see *The Arizona* v. *Anelich*, *supra*) to any seaman injured "in the course of his employment", Congress, in the absence of any indication of a different purpose, must be taken to have intended to make them applicable so far as the words and the Constitution permit; and to have given to them the full support of all the constitutional power it possessed. Hence the Act allows the recovery sought unless the Constitution forbids it.

The constitutional authority of Congress to provide such a remedy for seamen derives from its authority to regulate commerce, *Second Employers' Liability Cases*, 223 U. S. 1, and its power to make laws which shall be necessary and proper to carry into execution powers vested by the Constitution in the government or any department of it, Article I, § 8, cl. 18, including the judicial power which, by Article III, § 2, extends "to all Cases of admiralty and maritime Jurisdiction". By § 9 of the Judiciary Act of 1789, 1 Stat. 76, 28 U. S. C. § 371 (Third), Congress conferred on the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . ." By the grant of admiralty and maritime jurisdiction in the Judiciary Article, and § 9 of the Judiciary

Act, the national government took over the traditional body of rules, precepts and practices known to lawyers and legislators as the maritime law, so far as the courts invested with admiralty jurisdiction should accept and apply them. *Waring* v. *Clarke*, 5 How. 441, 459; *The Lottawanna*, 21 Wall, 558, 576; *In re Garnett*, 141 U. S. 1, 14; *Detroit Trust Co.* v. *The Barlum*, 293 U. S. 21, 43, and cases cited.

It is true that the jurisdiction in admiralty in cases of tort or collision is in general limited to events occurring on navigable waters, *Waring* v. *Clarke*, *supra*; cf. *The Blackheath*, 195 U. S. 361, and that the maritime law gave to seamen no right to recover compensatory damages for injuries suffered from negligence. *The Osceola*, 189 U. S. 158, 172, 175; *Pacific Co.* v. *Peterson*, 278 U. S. 130, 134. It allowed such recovery if the injury resulted from unseaworthiness of the vessel or her tackle, *The Osceola*, *supra*, 173, 175, and permitted recovery of maintenance and cure, ordinarily measured by wages and the cost of reasonable medical care, if the seaman was injured or disabled in the course of his employment. *The Osceola*, *supra*, 172-75; *The Iroquois*, 194 U. S. 240; *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 527-28.

But it cannot be supposed that the framers of the Constitution contemplated that the maritime law should forever remain unaltered by legislation, *The Lottawanna*, *supra*, 577, or that Congress could never change the status under the maritime law of seamen, who are peculiarly the wards of admiralty, or was powerless to enlarge or modify any remedy afforded to them within the scope of the admiralty jurisdiction. There is nothing in that grant of jurisdiction—which sanctioned our adoption of the system of maritime law—to preclude Congress from modifying or supplementing the rules of that law as experience or changing conditions may require. This is so at least with respect to those matters which traditionally have been within the cognizance of admiralty courts either because they are events occurring on navigable waters, see *Waring* v. *Clarke*, *supra*, or because they are the subject matter of maritime contracts or relate to maritime services. *Insurance Company* v. *Dunham*, 11 Wall. 1, 25.

From the beginning this Court has sustained legislative changes of the maritime law within those limits. See *Waring* v. *Clarke*, *supra*; *The Lottawanna*, *supra*; *Butler* v. *Boston Steamship Co.*,

130 U. S. 527, 555. Congress has both limited the liability of vessels for their torts even though not engaged in interstate commerce, *In re Garnett, supra; Hartford Accident Co. v. Southern Pacific*, 273 U. S. 207, 214, and extended the limitation to claims for damages by vessel to a land structure. Compare *The Plymouth*, 3 Wall 20, and *Cleveland Terminal R. R.* v. *Steamship Co.*, 208 U. S. 316, with *Richardson* v. *Harmon*, 222 U. S. 96, 101, 106. It has altered and extended the maritime law of liens on vessels plying navigable waters. *Detroit Trust Co.* v. *The Barlum, supra*, and cases cited. And the Jones Act itself has given seamen a right of recovery for injury or death, not previously recognized by the maritime law, which has been uniformly sustained by this Court in cases where the injury occurred on navigable waters. *Panama R., R. Co.* v. *Johnson, supra*, 385-87; *The Arizona v. Anelich, supra; Lindgren* v. *United States*, 281 U. S. 38.

As we have said, the maritime law, as recognized in the federal courts, has not in general allowed recovery for personal injuries occurring on land. But there is an important exception to this generalization in the case of maintenance and cure. From its dawn, the maritime law has recognized the seaman's right to maintenance and cure for injuries suffered in the course of his service to his vessel, whether occurring on sea or on land. It is so stated in Article VI of the Laws of Oleron, twelfth century, 30 Fed. Cas. 1174, and in Article XVIII of the Laws of Wisbuy, thirteenth century, *id.* p. 1191. And see Article XXXIX of the Laws of the Hanse Towns, *id.* p. 1200; Articles XI and XII of Title Fourth, Marine Ordinances of Louis XIV, *id.* p. 1209. Such is the accepted rule in this Court, see *The Osceola, supra*, 169, 175; *Calmar Steamship Corp.* v. *Taylor, supra*, 527-28, and it is confirmed by Article 2 of the Shipowners' Liability Convention of 1936, 54 Stat. 1695, proclaimed by the President to be effective as to the United States and its citizens as of October 29, 1939. Article 12 of the Convention provides that it shall not affect any national law ensuring "more favourable conditions than those provided by this Convention." 54 Stat. 1700.

Some of the grounds for recovery of maintenance and cure would, in modern terminology, be classified as torts. But the seaman's right was firmly established in the maritime law long before recognition of the distinction between tort and contract. In its origin, maintenance and cure must be taken as an incident to the status of the seaman in the employment of his ship. See *Cortes*

v. *Baltimore Insular Line*, 287 U. S. 367, 372. That status has from the beginning been peculiarly within the province of the maritime law, see *Calmar Steamship Corp.* v. *Taylor*, *supra*, and upon principles consistently followed by this Court it is subject to the power of Congress to modify the conditions and extent of the remedy afforded by the maritime law to seamen injured while engaged in a maritime service.

The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters. See *Waring* v. *Clarke*, *supra*; *Insurance Co.* v. *Dunham*, *supra*.

It follows that the Jones Act, in extending a right of recovery to the seaman injured while in the service of his vessel by negligence, has done no more than supplement the remedy of maintenance and cure for injuries suffered by the seaman, whether on land or sea, by giving to him the indemnity which the maritime law afforded to a seaman injured in consequence of the unseaworthiness of the vessel or its tackle. *Pacific Co.* v. *Peterson*, *supra*. Since the subject matter, the seaman's right to compensation for injuries received in the course of his employment, is one traditionally cognizable in admiralty, the Jones Act, by enlarging the remedy, did not go beyond modification of substantive rules of the maritime law well within the scope of the admiralty jurisdiction whether the vessel, plying navigable waters, be engaged in interstate commerce or not. Cf. *Jackson* v. *The Magnolia*, 20 How. 296; *The Belfast*, 7 Wall. 624, 640, *et seq*; *The Garnett*, *supra*.

The fact that Congress has provided that suits under the Jones Act may be tried by jury, on the law rather than on the admiralty side of the federal courts, does not militate against the conclusion we have reached. This is but a part of the general power of Congress to prescribe the forum in which federally-created causes of action are to be tried, *Claflin* v. *Houseman*, 93 U. S. 130, 136-42, —a concomitant of the power many times sustained by this Court to direct that causes of action arising under the Jones Act may be tried in the state courts. E. g., *Engel* v. *Davenport*, 271 U. S. 33, 37-38; *Panama R. R.* v. *Vasquez*, 271 U. S. 557; cf. *Garrett* v. *Moore-McCormick Co.*, 317 U. S. —.

We have no occasion to consider or decide here the question whether a longshoreman, temporarily employed in storing cargo on a vessel, if entitled to recover under the Jones Act for injuries sustained while working on the vessel (compare *International Stevedore Co.* v. *Haverty, supra*; with *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 137), could recover for an injury received on shore in the circumstances of this case. Compare *Industrial Commission* v. *Nordenholt Co.*, 259 U. S. 263, with *South Chicago Co.* v. *Bassett*, 309 U. S. 251, 256.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.